

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

OMNISEC INTERNATIONAL SECURITY
SERVICES, INC.¹

Employer

and

Case 5-RC-16209

NATIONAL ASSOCIATION OF SPECIAL
POLICE AND SECURITY OFFICERS²

Petitioner

and

INTERNATIONAL UNION, SECURITY,
POLICE AND FIRE PROFESSIONALS
OF AMERICA

Intervenor

DECISION AND DIRECTION OF ELECTION

The Employer provides security guard services at the Thurgood Marshall Federal Judiciary Building and other sites. The Petitioner, the National Association of Special Police and Security Officers (NASPSO), filed a petition with the National Labor Relations Board pursuant to Section 9(c) of the National Labor Relations Act seeking an election in a unit of all full-time and regular part-time security officers employed by the Employer at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. There are approximately 41 officers and

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

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sergeants in the petitioned-for unit.³ There is no history of collective bargaining for the employees in the petitioned-for unit.

The disputed issues are: (1) whether Petitioner NASPSO is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act; and (2) whether the Employer's three sergeants are statutory supervisors within the meaning of the Act and should be excluded from the unit. The Employer contends that NASPSO is not a labor organization. The Employer further contends that the sergeants are statutory supervisors and should be excluded from the unit based on their authority to discipline and effectively recommend discipline. The Petitioner disputes both of these positions.⁴ The Intervenor did not appear at the hearing or file a brief and has not taken a position on these issues.

I have carefully considered the evidence and arguments presented by the Employer and the Petitioner at the hearing and in the Employer's brief.⁵ For the reasons set forth below, I find: (1) the Petitioner is a labor organization within the meaning of Section 2(5) of the Act; and (2) the sergeants shall be permitted to vote subject to challenge.

The Employer presented testimony from Gregory C. Tyree, President of NASPSO Local 220; Caleb A. Gray-Burriss, Executive Director and Secretary/Treasurer of NASPSO; and Rick Anzelone, Project Manager of OMNISEC's Thurgood Marshall Federal Judiciary Building site. The Petitioner presented no witnesses.

³ The Employer and the Petitioner stipulated that an appropriate unit includes all full-time and regular part-time security officers employed by the Employer at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. and excludes all captains, lieutenants, office clerical employees, professional employees, managerial employees, and supervisors as defined by the Act.

⁴ The Petitioner has indicated its willingness to proceed to election in any unit found appropriate.

⁵ The Petitioner did not file a brief.

I. LABOR ORGANIZATION STATUS

A. Facts

NASPSO is a union representing more than 1000 security guards. The parties stipulated, and the record demonstrates, that NASPSO is an organization that deals with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. It has negotiated collective-bargaining agreements containing provisions for wages, benefits, and other working conditions with a number of security companies, including SecTek Security and Coastal International. It brings grievances on behalf of represented employees. The employee membership of NASPSO participates in the negotiation of collective-bargaining agreements and elects local and national officers.

The Board recently found NASPSO to be a labor organization within the meaning of Section 2(5) in *National Association of Special Police and Security Officers*, 351 NLRB No. 77, (2007).

B. Analysis

Only two criteria are necessary for a union to meet the statutory definition of a labor organization: (1) it must be an organization in which employees participate; and (2) it must exist for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms of employment. See, e.g., *Alto Plastics Manufacturing Corp.*, 136 NLRB 850 (1962). The record contains uncontroverted evidence that employees participate in NASPSO by, among other things, paying membership dues, electing local and national officers, and assisting in collective-bargaining negotiations. Moreover, the record contains uncontroverted evidence that NASPSO exists, at least in part, for the purpose of dealing with employers concerning terms of employment.

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The Employer does not contest these facts. Instead, the Employer contends that NASPSO is not a labor organization as defined in Section 2(5) of the Act because the union “operates at the whim of its officers” and is “run for the benefit of [Secretary/Treasurer] Mr. Gray-Burriss and possibly other officers,” who have allegedly misappropriated and mismanaged NASPSO’s funds. The Employer also alleges that NASPSO does not comply with the governing documents adopted by its membership and operates in violation of the LMRDA.

The Employer’s claim that Mr. Gray-Burriss has misappropriated the Union’s funds is irrelevant to this inquiry, however. The Board has consistently held that if an organization meets the two criteria discussed above, “the fact that it is an ineffectual representative, that its contracts do not secure the same gains that other employees in the area enjoy, that certain of its officers or representatives may have criminal records, that there are betrayals of the trust and confidence of the membership, or that its funds are stolen or misused, cannot affect the conclusion which the Act then compels us to reach, namely, that the organization is a labor organization within the meaning of the Act.” *Alto Plastics*, 136 NLRB at 851. Likewise, it is irrelevant whether NASPSO is in compliance with the LMRDA or its own governing documents. See, e.g., *Westside Community Mental Health Center, Inc.*, 327 NLRB 661, 663 (1999) (non-compliance with the LMRDA); *Yale New Haven Hospital*, 309 NLRB 363, 364 (1992) (lack of formal governing documents).

Harrah’s Marina Hotel and Casino, 267 NLRB 1007 (1983), cited by the Employer, is distinguishable. In that case, the Regional Director found that there was no evidence that the union had ever had a general membership meeting, had ever had an election of officers, or had ever countenanced employee participation in its affairs. The Regional Director specifically distinguished the case from *Alto Plastics Manufacturing Corp.* on that basis. Moreover, the

Regional Director's decision was based, in part, on the union's failure to comply with subpoenas to produce documents at the hearing. As discussed above, the uncontroverted evidence here shows that the Petitioner holds membership meetings, elects its officers by secret ballot election, negotiates arms-length collective-bargaining agreements with employers, and processes grievances. Furthermore, the Petitioner has not failed to produce subpoenaed evidence; the hearing officer correctly determined that the documents sought are not relevant to the issues at hearing and granted the Petitioner's request to quash the Employer's subpoena. Additionally, two of the three witnesses who testified at the hearing were NASPSO officers, appearing pursuant to subpoenas issued on behalf of the Employer. The Employer has provided no valid basis for distinguishing this case from *Alto Plastics* and its progeny, in which the Board has consistently held that allegations of officer corruption and malfeasance are insufficient to rebut a union's status as a labor organization. See, e.g., *Coinmach Laundry Corp.*, 337 NLRB 1286, (2002); *Mohawk Flush Doors, Inc.*, 281 NLRB 410 (1986).

Therefore, I conclude Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

II. SUPERVISORY STATUS OF THE SERGEANTS

A. Facts

NASPSO seeks to represent the approximately 38 security officers and 3 sergeants in the petitioned-for unit.⁶ The sergeant position is a newly-created position; at the time of the hearing, the sergeants had been performing their new duties for about three weeks. The security officers

⁶ There are 20-22 security officers on the day shift, 13 security officers on the swing shift, and 3 security officers on the midnight shift. There are no sergeants on the midnight shift.

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and sergeants are supervised by four lieutenants, a captain, and the project manager.⁷ At least one of the lieutenants or the captain is on duty at all times. The sergeants receive \$1.75 per hour more in pay than the security officers. Sergeants wear a gold emblem on their uniform collar.

The sergeants are responsible for issuing weapons and conducting roll call at the beginning of a shift. At roll call, the sergeants take attendance, make announcements, inspect the officers for proper uniform and grooming, and send the officers to their posts.⁸ If officers are late or call out, the sergeant will seek a volunteer to cover the absent officer's post. As a general matter, the sergeants do not sit at a fixed post but rove the building ensuring that the building is safe and secure.⁹ They inspect the officers at their posts, using a checklist provided by the Employer. On this checklist, called an "Officer Daily Inspection Form," the sergeant notes each officer on duty for that shift, his or her post, and any violation the sergeant observes. The form lists twenty codes for possible violations, although only three types of violations are reported on the examples provided by the Employer: "Late/roll call," "Late from break," and one example of "Uniform issues."¹⁰

The sergeants are expected to know and to enforce the Employer's policies. If a situation warrants immediate action, the sergeants are authorized to take corrective action. For instance, if an officer reports to work with alcohol on his or her breath, the sergeant is authorized to send the employee home. If an officer reports to work without the proper uniform, the sergeant is

⁷ Only two of the four lieutenant positions are currently filled. One of the three sergeants, Sergeant Jefferson, is temporarily covering the third lieutenant position. The fourth remains unfilled. The Employer and the Petitioner have stipulated that the captain and lieutenants should be excluded from the unit.

⁸ There is no evidence as to who assigns officers to their posts.

⁹ One of the sergeants regularly works at a fixed post in the loading dock area. He retains his authority as sergeant while working that post.

¹⁰ The officers stationed at Post 1 are responsible for reporting to the sergeant whenever someone returns from break late. The sergeant will then attempt to contact the late officer to advise him or her to return to the post and note the violation on the Officer Daily Inspection Form. Violations recorded on the Officer Daily Inspection Form may or may not result in discipline; there is no evidence, however, how such a determination is made.

authorized to direct the employee to wear the correct uniform. If an officer is late returning from break, the sergeant is authorized to instruct the officer to return to his or her post.

The Employer has a progressive disciplinary system, with three categories of offenses. In one category, a first offense can result in termination. In the other two categories, there are progressive steps leading to termination. The sergeants can fill out counseling forms called Employee Disciplinary/Counseling Reports (DCR). The sergeant fills out the section entitled "Supervisors' Comments" with a narrative of the incident. The sergeant may recommend discipline in this section. The DCR form has a section entitled "Approvals," with space for two signatures, the shift supervisor and the project manager. Either a lieutenant or the captain must review the DCR and sign as shift supervisor.¹¹ The "Approvals" section states that "Operation/Division Manager's approval required if action involves suspension, loss of pay, or termination" and "Director of Human Resources approval required if action is termination for cause." Based on the sergeants' recommendations, a lieutenant, the captain, or the project manager will determine the appropriate discipline.

B. Analysis

Section 2(11) of the Act provides that a "supervisor" means any individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, or responsibly direct employees, or effectively to recommend such action. 29 U.S.C. Section 152. The possession of any one of the authorities listed is sufficient to confer supervisory status. The exercise of such authority must not be of a merely routine or clerical nature, but require the use of independent judgment. 29 U.S.C. Section 152. Judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the

¹¹ None of the three DCRs received into evidence were signed by the project manager. Two of them had not yet been given to the employees at whom they are directed.

verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement. *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 8 (2006). It is well-established that the burden of proving that an individual is a supervisor rests on the party asserting supervisory status. See *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001).

It is unclear whether the sergeants have the authority to issue discipline. There is evidence that the sergeants have the authority to address infractions of the Employer's policies and rules. For example, they instruct officers to put on the correct uniform when in violation of the dress code. The record does not clearly indicate, however, whether such an action constitutes discipline under the Employer's progressive disciplinary system. Likewise, while a sergeant can write up a DCR recommending discipline, it is unclear from the record whether the DCR itself constitutes discipline or lays a foundation for future discipline under the Employer's progressive disciplinary system. Compare *Oak Park Nursing Care Center*, 351 NLRB No. 9, slip op. at 2 (2007).

Moreover, while the record demonstrates that the sergeants' have the authority to recommend discipline, it is unclear whether the sergeants' recommendations are "effective." There is little record testimony as to how management makes disciplinary decisions and none as to the weight given to the sergeants' recommendations.

Finally, the record is unclear as to whether the sergeants exercise independent judgment in recommending discipline. There is no evidence to indicate whether the sergeants exercise discretion in writing up DCRs or whether their discretion is substantially or wholly constrained by the Employer's policies. See *Shaw, Inc.*, 350 NLRB No. 37, slip op. at 4 (2007).

While the Employer has the burden to show that the sergeants are supervisors, the sergeant position had only existed for about three weeks at the time of the hearing. This, coupled

with the fact that the case involves only three sergeants overseeing less than forty officers, suggests that the full range of the sergeants' authority may not yet have been apparent at the time of the hearing. For instance, the sergeants had written-up only three DCRs, two of which had not been presented to the employees involved. Under these circumstances, the lack of detail in the record regarding the supervisory status of the sergeants may be due to the novelty of the sergeants' role. Therefore, I shall permit the sergeants to vote subject to challenge.

CONCLUSIONS AND FINDINGS

Accordingly, given the record here in the instant matter, I will direct an election.

Based upon the entire record in this matter and in accord with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner, National Association of Special Police and Security Officers (NASPSO), is a labor organization as defined in Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. The Intervenor, International Union, Security, Police and Fire Professionals of America, is a labor organization as defined in Section 2(5) of the Act.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.
6. The parties have stipulated that the Employer provides security guard services to various government agencies throughout the United States, including at the Thurgood Marshall Federal Judiciary Building in Washington, DC, the only location involved in these proceedings. Annually, the Employer, in conducting its business operations described above, performs services valued in excess of \$50,000 in States other than the District of Columbia.
7. I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time security officers employed by the Employer at the Thurgood Marshall Federal Judiciary Building in Washington, DC, but excluding all captains, lieutenants, office clerical employees, professional employees, managerial employees, and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **National Association of Special Police and Security Officers** or by **International Union, Security, Police and Fire Professionals of America** or by **Neither**. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

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B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 5, 103 South Gay Street, Baltimore, MD 21202, on or before **April 16, 2008**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by mail, by electronic filing through the Agency website, www.nlr.gov,¹² or by facsimile transmission at (410) 962-2198. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

¹² To file the list electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu. When the E-File page opens, go to the heading Regional, Subregional, and Resident Offices and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. The user then completes a form with information such as the case name and number, attaches the document containing the list of eligible voters, and clicks the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, www.nlr.gov.

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Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., E.S.T. on **April 23, 2008**. The request may be filed electronically through E-Gov on the Board's website, www.nlrb.gov,¹³ but may not be filed by facsimile.

(SEAL)

/s/ Wayne R. Gold

Dated: April 9, 2008

Wayne R. Gold, Regional Director
National Labor Relations Board, Region 5
103 S. Gay Street
Baltimore, MD 21202

¹³ Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-filing page the user should select the option to file documents with the Board/Office of the Executive Secretary.

